PP

v.

TAN PENG TONG & ANOR

HIGH COURT MALAYA, SHAH ALAM
NURCHAYA ARSHAD JC
[CRIMINAL TRIAL NO: 45B-145-2010]
14 DECEMBER 2012

CRIMINAL LAW: *Murder - Section 302 of Penal Code - Circumstantial evidence - Murder of three year old girl - Accused persons parents and guardians of child victim - Whether victim subjected to severe physical and mental abuse and neglect - Victim developed lung infection and stopped breathing - Whether injuries sustained spoke of gross physical abuse - Whether death precipitated by failure of accused to provide victim with timely and adequate medical care*

EVIDENCE: *Circumstantial evidence - Securing conviction on - Whether sufficient to convict accused of murder - Whether extensive physical injuries spoke of gross physical abuse - Whether injuries sufficient in ordinary course of nature to cause death - Whether death precipitated by failure of accused to provide victim with timely and adequate medical care - Whether defence a bare denial and failed to cast reasonable doubt on prosecution's case*

Both the accused in this case were jointly charged under s. 302 of the Penal Code for the murder of a three-year-old girl ('the victim') by subjecting her to severe physical and mental abuse and neglect. The victim was the child of the second accused, a single-parent who had another child with her live-in boyfriend, the first accused. The victim had previously lived with a full-time nanny for three years and seven months before the second accused ended that arrangement and brought the victim to live with her and the first accused, apparently to reduce expenses. Medical evidence adduced by the prosecution showed that over the 44 days the victim lived with the accused, she was severely beaten with various objects and sometimes denied of food and water. On one occasion, the victim's hands and feet were tied to a chair and she was gagged to prevent her from screaming and was left in such a state alone in the house with the lights off whilst the two accused and their other child went outstation for two days. The victim fell sick from the constant abuse, her immunity dropped and she

developed an infection in her lungs. Yet, both the accused denied her medical treatment. When the first accused finally took her to the government clinic after the victim had stopped breathing, she was pronounced dead on arrival. Her body was covered with bruises, lacerations and swelling. An autopsy revealed the cause of death to be Pneumonia Lobar 'Red Hepatisation'. The medical evidence showed the victim could have been saved from death if timely and adequate medical attention had been given. Both accused admitted during the trial that they had beaten the victim but claimed it was not severe and was only meant to discipline the child as she was naughty, refused to listen to them and constantly rebelled. They also claimed most of the bruises on the victim were self-inflicted as the child had a habit of climbing onto furniture and falling as a result.

Held (convicting both accused and sentencing them to death):

(1) After considering all the evidence, the court found that the physical injuries on the victim could not have been inflicted in the course of reasonable disciplining but rather they represented physical abuse. Both the accused did not deny they had beaten the victim. From their defence and other evidence, the court observed that the beating and punishment had gotten out of hand and became abusive and caused harm from which the victim eventually died. (paras 13 & 38)

(2) The prosecution's evidence was wholly circumstantial in nature. After having considered the total strength of each individual strand of evidence and its combined strength, there was sufficient evidence to connect both the accused to the offence. The court was satisfied that the prosecution had proved its case beyond reasonable doubt; that the accused persons had inflicted the bodily injuries on the victim sufficient in the ordinary course of nature to cause death. (paras 22 & 40)

(3) The death in this case could not, as was contended by the defence, be attributed to the pneumonia (which was the immediate cause of death) but to the events that caused the victim's immune system to be weakened. The victim had suffered physical injuries at the hands of both accused and her physical health was compromised. The death became a homicide because the continuous beatings, abuse and refusal

to give her medical attention set in motion the chain of events that led her to contract pneumonia and die. Considering the victim's age, it was a life-threatening condition. As parents and guardians, both accused deliberately refused and/or failed to provide the victim with the needed medical care. Her death was the result of their failure to act. (paras 19 & 20)

(4) The defence's case was a bare denial that failed to cast a reasonable doubt on the prosecution's case. The degree of beatings was not light. Extreme force was used when the victim was beaten. (paras 31 & 33)

Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Fazla v. Emperor AIR 1928 Lah 851 ***(refd)***
Mah Kok Cheong v. R [1953] 1 LNS 53 HC ***(refd)***
Mahbub Shah v. King Emperor AIR 1945 PC 118 ***(refd)***
Nur Muhammad & Anor v. Emperor 31 Cri LJ 1930 ***(refd)***
Ong Chee Hoe & Anor v. PP [1999] 4 SLR 688 ***(refd)***
PP v. Chan Choon Keong & Ors [1989] 2 CLJ 216; [1989] 2 CLJ (Rep) 300 HC ***(refd)***
PP v. Saimin & Ors [1971] 1 LNS 115 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 180, 182A
Penal Code, ss. 34, 300, 302

For the prosecution - Fazillah Begum Abd Ghani; DPP
For the accused - TL Chen; M/s TL Chen & Co

Reported by Ashok Kumar

JUDGMENT

Nurchaya Arshad JC:

Charge

[1] Both accused were charged with an offence of murder that read as follows:

Bahawa kamu, bersama-sama di antara 1 Mac 2010, jam lebih kurang 12.00 tengah malam hingga 14 April 2010 jam lebih kurang 7.50 pagi, di rumah No. D-3-15, Blok D, Tingkat 3, Pangsapuri Bayu, Taman Bukit Serdang, di dalam Daerah Petaling, dalam Negeri Selangor Darul Ehsan, dengan niat

bersama telah membunuh seorang kanak-kanak perempuan bernama Jasmine Lee Siew Hui (No. Kad Pengenalan MyKid: 060609-14-0076) dan dengan itu kamu telah melakukan kesalahan seksyen 302 Kanun Keseksaan dan dibaca bersama-sama seksyen 34 Kanun yang sama.

Facts Of The Case

[2] Earlier in the morning of 14 April 2010, a girl child was rushed to the Emergency Unit at Klinik Kesihatan Seri Kembangan. The Chinese man who carried her told Dr Shafie Abdullah bin Mohammed ('SP9'), who was on duty, that the child has stopped breathing. On examination the child was confirmed dead and on further inspection by SP9 of the child's body revealed signs of swelling in the head, bruises ranging from various colours on the forehead, arms, legs and body of the victim. Marks encircling the child's ankles were also spotted. The child was identified as Jasmine Lee Siew Hui ('victim') aged three years ten months old. On the next day, an autopsy was performed by the pathologists, Dr Abdul Karim bin Haji Tajudin ('SP14') at the Hospital Serdang and on examination, he pronounced that the child's cause of death was Pneumonia Lobar "Red Hepatisation". Investigation revealed that both the mother of the victim, Wong Mei Ting ('second accused') and her live-in-boyfriend, Tan Peng Tong ('first accused'), apparently who was identified as the Chinese man who earlier carried the victim to the Emergency Unit Klinik Kesihatan Seri Kembangan; were responsible for the victim's death and thus ensued the charge of murder under s. 302 of the Penal Code to be read together with s. 34 (common intention) of the same Code against them.

[3] Altogether the prosecution presents 21 witnesses to adduce evidence in unearthing the circumstances steering to the death of Jasmine (victim). Very little can be told about the victim, for her untimely death came unexpectedly on her almost fourth year since she came to this world. Jasmine's birth certificate (EP80) will show that she was born on 9 June 2006. She is the daughter of Wong Mei Ting (second accused), whose failed marriage landed her to fend for herself and her child, Jasmine. On obtaining a job as a bartender she procured a nanny for Jasmine named Mah Kuan (SP8) for payment of RM800 per month from 1 August 2006 and it was a full time (day/night) charge until the second accused

terminated her supervision of the victim and instead brought the victim home to stay with her and her live-in boyfriend, Tan Peng Tong (first accused) on 1 March 2010.

[4] Wong Mei Suat (SP6) and Wong Kok Khaw (SP7) was also roped in to corroborate prosecution's evidence. SP6 is the sister and SP7 is the father respectively, of the second accused. Tan Kan Hoe (SP4), father of the first accused also gave evidence.

[5] Medical evidence was also adduced to discover the cause of death and finally the police witnesses, in particular the investigating officer (SP20) of this case, whose evidence chronicled the event which followed the death of the victim in its entirety and ensued a closure to the prosecution's case.

Elements Of The Offence

[6] Section 300 of the Penal Code provides that:

> Except in the cases hereinafter excepted, culpable homicide is murder:
>
> (a) if the act by which the death is caused is done with the intention of causing death;
>
> (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
>
> (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
>
> (d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

End Of Prosecution's Case

[7] The prosecution bears the burden of proving a *prima facie* case provided for under s. 180 of the Criminal Procedure Code. Section 180 provides:

> (1) When the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a *prima facie* case against the accused.

(2) If the court finds that the prosecution has not made out a *prima facie* against the accused, the court shall record an order of acquittal.

(3) If the court finds that a *prima facie* case has been made out against the accused on the offence charge the court shall call upon the accused to enter on his defence.

(4) For the purpose of this section, a *prima facie* case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

[8] The test of *prima facie* was explained in the case of *Balachandran v. PP* [2005] 1 CLJ 85; [2005] 2 MLJ 301, where the Federal Court held that:

> The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a *prima facie* case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no *prima facie* case.

[9] Therefore, the prosecution is required to prove a *prima facie* case and establish the following elements:

(a) the death of the victim;

(b) the death was caused by the bodily injuries suffered by her;

(c) the bodily injuries were inflicted by both accused; and

(d) those such bodily injuries are sufficient in the ordinary course of nature to cause death.

Evidence

The Death Of The Victim

[10] SP9 on oath gave evidence that the victim who was brought to him on the 14 April 2010 @ 7.45am at the Klinik Kesihatan Seri Kembangan, Emergency Unit was on examination validate dead and this was confirmed by SP14. It was not disputed that the victim was Jasmine Lee Siew Hui. Her body was identified by SP6 and SP8.

The Death Was Caused By The Bodily Injuries Suffered

[11] The prosecution called SP14, a pathologist who performed the autopsy on the victim to testify. SP14 found that the victim's cause of death was Lobar Pneumonia "Red Hepatisation". SP14 testified that a large and continuous area of the lung was infected. SP14 explained that lobar pneumonia has an acute progression. There was congestion in the first 24 hours. When the vascular congestion persisted, with extravasations of red cells into alveolar spaces, it leads to the stage of red hepatisation. Based upon the post mortem, the victim's lung appeared to be firm, 'meaty' and airless. As a result from the injuries and bruises, pneumonia supervenes and caused her death. SP14 further elaborated that the victim, being a child of tender years, will suffer emotional turmoil which caused her to be sad and depressed. It will further weaken her immune system when she suffered from fever and cold, and her body could not fend off the infection. SP14 opined that the child's condition was worsening when she was denied treatment that inevitably leads to her death. SP14 stated that if the victim was treated adequately and on time, death could be prevented.

[12] Earlier SP9 asserted that on further inspection the victim's body showed signs of swelling in the head, bruises ranging from various colours on the forehead, arms, legs and body of the victim and marks encircling the child's ankles was also spotted. This was confirmed by SP14 and he further elaborated that there were 66 injuries found on the victim's body. The presence of bruises and lacerations was obvious and SP14 testified that one way to determine the approximate age of a given bruise is by the colour and the approximate age of the bruises found on the various parts of the victim's body are less than 14 days. The bruises were caused by the substantial amount of harsh gripping, pinching, beatings and kicking. SP14 also confirmed that the distinct configurations of the bruises and lacerations resemble objects such as a belt, a belt buckle, a cloth hanger, a cane and other blunt objects. The above objects were found at the accused's house during police investigation. According to SP14, the bruises and wounds were inflicted by a person in extreme anger. SP14 also confirmed that the majority of the bruises and wounds could not be self-inflicted. It was not disputed that both accused had beaten the victim. However, according to them, it was because

A the victim was extremely naughty, and the punishment was meant to discipline her. Both doctors (SP9 and SP14) found laceration marks on the victim's wrists and ankles. SP14 make an observation by basing upon the markings, the rope used to tie the victim has a diameter of 0.5mm. This was also consistent with the rope
B found in the accuser's house. This was the direct result of the victim being tied when the couple left for Melaka on 11 April 2010 and 12 April 2010.

[13] After considering all the evidence, the presence of bruises
C and lacerations, the court found that the physical injuries, the present of bruises and lacerations could not be inflicted upon the child during the course of a reasonable discipline but rather represent physical abuse. The court observed from the photographs and noted that the bruises found on the victim's body ranged
D from yellowish, green, dark red/purple.

[14] SP14 concluded the pattern of bruises and lacerations as follow:

> Pada pendapat saya secara fizikal saya dapati banyak lebam-lebam
E dan luka calar. Lebam-lebam tersebut hampir diseluruh badan. Ada kesan seperti kena keras seperti rotan dan ada kesan genggaman keras dan kesan cubit. Itu menunjukkan secara teratur dipukul dan ditendang dan dilakukan pada masa yang berlainan. Kesan lebam akibat genggaman adalah nampak ketara dan ini bagi saya memberikan makna, kanak-kanak ini dipegang dalam keadaan yang
F memegang itu dalam sangat geram. Kesan akibat pukul adalah sangat banyak dan ini memberi kesan pada saya yang ia dilakukan dalam keadaan marah yang teramat sangat.

[15] The court observed that SP14 is a qualified expert medical
G witness who possesses that kind of expertise and is therefore entitled to state his opinion on this matter and relied upon by this court. The court thus acknowledge SP14's evidence and proceed to weight all available evidence.

H *The Bodily Injuries Were Inflicted By Both Accused*

[16] It was not disputed that both accused had beaten the victim. However according to them, it was because the victim was extremely naughty and the punishment was meant to discipline her.

I

[17] As claimed by SP7, the second accused's father during his visit on March 2010, he noticed bruises on the victim's hand caused by caning. In fact the second accused told her sister SP6, that the victim was canned because she was extremely naughty. SP6 advised the second accused that the punishment should not be too severe but the second accused later informed her that the victim's behaviour had not improved even though she was caned. SP4, the first accused's father also revealed that both accused together with their baby son came to visit him on 12 April 2010 and he was totally unaware that the second accused had another child. During the defence case, the first accused gave evidence that the victim was left in the house alone tied to a chair in a room with the lights off, while the couple and their son Titus was visiting SP4. Mrs Mah Kuan (SP8) came to the court and adduced evidence that she was the nanny of the victim from 1 August 2006 until 1 March 2010 when the second accused took Jasmine (victim) home. Evidence showed that when the victim was placed under the care of the nanny, she was only two months old and she continued to be cared until she was three years old. All these time the nanny took care of the victim full time and the second accused only visited Jasmine when she is free and only during the day, night time will be sleeping with the nanny. Jasmine on been taken by the mother (second accused) has only 44 days to live when she suddenly expired on 14 April 2010. SP8 testified that when the victim was under her care she was a well-mannered, well behaved and bodily healthy child. She continued and said that she know of Jasmine's death on being informed by Michele (SP6) through telephone and on 15 April 2010 was brought to Hospital Serdang and at the mortuary she identified the body of a dead child as Jasmine. She confirmed that Michele (SP6) was also present to identify the victim.

Those Such Bodily Injuries Are Sufficient In The Ordinary Course Of Nature To Cause Death

[18] Another 'disciplinary technique' that this court considered bizarre by most community standard, ie, tying a child (victim) on a chair for extended periods of time.

[19] This was a case of fatality from abuse and intentional neglect. From the evidence adduced by the prosecution, it seems that the couple cares nothing about the victim. They deliberately inflicted those injuries on the victim and restrained her for several

hours without food and water. The immediate physical effects of abuse (bruises and lacerations) are relatively temporary; however, the pain and suffering they caused a child should not be discounted. Meanwhile, other impact of child abuse is just beginning to be explored. As explained by SP14, the victim who suffered from abuse also suffered from ailments such as flu and fever. The doctor also explained that the victim's immune system had weakened and was more susceptible to infections. Considering the fact that the victim was only a child under the age of five, it was a life threatening condition. As parent and guardian, both accused deliberately refused and/or failed to provide the victim the needed medical care and the child's health was threatened with harm. The victim's death resulted from both accused's failure to act, causing her condition to be worsen.

[20] The defence submitted the victim died of pneumonia and is a known complication among children. Therefore, both accused could not be liable to the victim's death. The court disagreed. The manner of death in this case should be based not one the pneumonia (the immediate cause of death) but on the events that caused the child's immune system to be weaken. In this case, the victim suffered physical injuries inflicted by both accused and her physical health was compromised. The manner of death becomes a homicide, because the accused continuous beatings, abuse and refusal for give the victim medical attention, set in motion the chain of events that ultimately lead the victim getting the pneumonia. In the present case, the court accepted SP14's evidence and found that the victim had received those injuries inflicted by both accused and as a result of those injuries pneumonia had supervened resulted in her death. (Ref *Nur Muhammad & Anor v. Emperor* 31 Cri LJ 1930 and *Fazla v. Emperor* AIR 1928 Lah 851).

[21] A home should be a sanctuary for a child. However, in this case, the victim had been abused physically and emotionally. She suffered harm for a period of a month before she met her fate.

[22] The evidence adduced by the prosecution is wholly circumstantial in nature. After having considered the totality strength of each individual strand of evidence and its combined strength, there is sufficient evidence to connect both accused with the offence. After a careful analysis of all the evidence, the court

is satisfied that both accused inflicted the bodily injuries that are sufficient in the ordinary cause of nature to cause death. Therefore, the court finds that the prosecution has successfully proven a *prima facie* case and called both accused to enter into their defence.

End Of Defence's Case

[23] At the end of defence's case, the court has to decide whether the prosecution has proven its case beyond reasonable doubt, as provided pursuant to s. 182A of the Criminal Procedure Code.

[24] In the case of *Mah Kok Cheong v. R* [1953] 1 LNS 53; [1953] MLJ 46, Spencer Wilkinson J decided at p. 47:

> ... in ordinary criminal case ... all discussion as to what might reasonably be true or what is consistent with innocence are both irrelevant and misleading. Almost every defence put forward by an accused in consistent with innocence or it would not be put forward; nor would it be a very good defence if it could not reasonably be true. But whatever may be the defence to a criminal charge the sole question which a Subordinate Court has to ask itself at the conclusion of the trial is – Does the defence raised a reasonable doubt as to the truth of the prosecution case or as to the accused's guilt? I say "the sole question" advisedly because in this country the accused will not have been called on for a defence at all unless the prosecution have first proved a case.

[25] At the defence's case, both accused have three options:

(i) first: they testify on oath and will be subjected to cross-examination by the prosecution;

(ii) second: they could give evidence from the dock and be exempted from cross-examination;

(iii) thirdly: they could remain silent.

[26] It is settled law that the accused person at the defence's case is merely required to cast a reasonable doubt on the prosecution's case. The case of *PP v. Saimin & Ors* [1971] 1 LNS 115; [1971] 2 MLJ 16 defined reasonable doubt as follows:

> ... a reasonable doubt must be a doubt arising from the evidence or want of evidence and cannot be an imaginary doubt or conjecture unrelated to evidence.

[27] Therefore, to warrant an acquittal, the defence put forward by both accused must a story that leaves this court in a genuine and reasonable doubt as to whether the explanations put forward by them are true.

[28] In this case, both the accused decided to testify on oath. They decided to care for the victim on their own as they needed the money to pay for daily expenses as they are having another child, Titus. However, the victim decided to rebel against them and behaved inappropriately. The victim would not listen to the couple therefore they beat her with a cane. However, they maintained that the degree of beatings were light. They also maintained that the purpose of the beating was for punishment as the child was extremely naughty.

[29] On both 11 April 2010 and 12 April 2010, when the couple left for Melaka with Titus, the first accused tied up the child at the chair. They also put a piece of cloth in the victim's mouth to prevent her from screaming. The purpose of doing so was to avoid the child from running away from home when they were away. The second accused attempted to push the blame on the first accused by telling the court that it was the first accused's idea to tie up the child and leave the child alone in the house. Although she was worried, she did nothing to stop the first accused.

[30] In their stories, they also describe the victim as an active child, who liked to climb on top of the furniture. The accused also informed the court that the victim fell from the furniture occasionally and injured herself. They maintained that during the time when the victim's was under their care, there were no bruises on the child's body as shown in the photographs. They only knew of the bruises after the victim's death.

[31] After having carefully analysed the defence, the court found that it was a bare denial that could not cast a doubt on the prosecution's case.

[32] According to the doctor, the bruises on the victim's body were ranging from multiple colours and were less than two weeks. Further, from the photographs tendered, these bruises were clearly visible on the victim's body. Both accused's denial of having seen any bruises on the victim's body clearly showed that they turn a blind eye over the victim's worsening condition.

[33] The degree of beatings could not be said to be light when the second accused admitted that she was so furious when she was caning the victim until the cane snapped into two. This could only lead to one explanation ie, extreme force was imposed when beating the victim. This was also consistent with SP14's evidence that the injuries were inflicted by person under extreme anger. The court observed that both accused were frustrated as the initial punishment could not put an immediate halt to the victim's naughty behaviour. The victim still behaved inappropriately, as if to antagonise her parent and guardian. This was when abuse and neglect crept in. They deliberately neglected the child's need for medical attention, leading her to the tragic death.

Conclusion

[34] To recapitulate the prosecution called 21 witnesses to give evidence in order to prove the offence of murder. The court found that all the four elements has been successfully established. SP20, the investigating officer has asserted that the identification of the deceased was made by the deceased's auntie SP6, Wong Mei Suat and the nanny (SP8) who took care of victim's majority lifespand. SP14 (pathologist) had confirmed the deceased had died on the 14 April 2010 @ 7.45am and he confirmed that SP20 were present at the time of the post-mortem examination.

[35] I shall now deal with the subject of common intention. That brings me to s. 34 of the Penal Code which reads:

> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for act in the same manner as if the act were done by him alone.

[36] In this connection, I would like to refer to a Privy Council case which has so often been cited in our courts. It is the case of *Mahbub Shah v. King Emperor* AIR 1945 PC 118 and the passage is at 153 (per Sir Madhavan Nair):

> To invoke the aid of s. 34 successfully it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all. If this is shown, then liability for the crime may be imposed on any one of the person in the same manner as if the act were done by him alone. That common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused

A of an accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been often observed, it is difficult, if not impossible, to procure direct evidence to prove the intention of an individual. In most cases it has to be inferred from his act or conduct or other relevant circumstances of the case.

B

[37] Also to *PP v. Chan Choon Keong & Ors* [1989] 2 CLJ 216; [1989] 2 CLJ (Rep) 300 at p. 307; [1989] 2 MLJ 427 at p. 431 Per Faiza Tamby Chik JC:

C In simple language, if a number of persons come together and agree to commit a criminal act and proceed to commit that act, acting together, then if that act is actually committed, each and every one of them who have agreed to do the act and assisted in doing it, is guilty of the offence. The question here is 'if that act is actually committed.

D

[38] It is a well-established principle of law in dealing with criminal liability under s. 34 of the Penal Code that the pre-planning may be developed on the sport or during the course of the commission of the offence. The existence of common intention is a question E of fact and it may be proved as a matter of inference from the circumstances of the case. Reverting to the facts, both accused did not deny that they had beaten the victim and punished her in order to discipline her. However from their defence and other evidences gathered the court observed that the beating and F punishment got out of hand and it became abusive that caused harm to the victim which eventually led to her death.

[39] And further, to *Ong Chee Hoe & Anor v. PP* [1999] 4 SLR 688 at p. 700 per Yong Pung How CJ:

G The law in this area has been well settled since *Mimi Wong v. PP* [1972] 2 MLJ 75; [1972-1974] SLR 73 and *PP v. Neoh Bean Chye* [1975] 1 MLJ 3; [1972-1974] SLR 213 where the courts held that the prosecution need not show that the common intention of the accused persons was to commit the crime for H which they were charged. It is the intention of the actual doer of the criminal offence charged that is in issue, and the application of s. 34 would make the others vicariously liable for the same offence. Put in another way, what this means is that the participants need only have the *mens rea* for the offence commonly intended and it is not necessary for them to also possess the *mens* I *rea* for the offence for which they are actually charged.

At the risk of repetition, we note here Wee Chong Jin CJ's words in *Mimi Wong v. PP (supra):*

If the nature of the offence depends on a particular intention, the intention of the actual doer of the criminal act has to be considered. What this intention is will decide the offence committed by him and then s. 34 applies to make the others vicariously or collectively liable for the same offence. The intention that is an ingredient of the offence constitute by the criminal act is the intention of the actual doer and must be distinguished from the common intention of the doer and his confederates. It may be identical with the common intention or it may not.

The above principle had been consistency approved of an applied by the Singapore courts (see *Suradet v. PP* [1993] 3 SLR 265, *Ibrahim bin Masod v. PP* [1993] 3 SLR 873, *Mansoor s/o Abdullah v. PP* [1998] 3 SLR 719, *Too Yin Sheong v. PP (supra)* and *Shaiful Edham bin Adam v. PP* [1999] 2 SLR 57).

Whether there is a common intention between parties is essentially a question of fact to be inferred from all the circumstances of a case. While common intention implies acting in concert and suggests the existence of a pre-arrange plan, it is also possible for the common intention to develop on the spot. In *Samlee Prathmtree v. PP* [1996] 3 SLR 529, the court of appeal held that common intention would develop on the spot, so long as it preceded the commissions of the offence. This was followed in the later case of *Asogan Ramesh s/o Ramanchandran v. PP* [1998] 1 SLR 286. It is therefore not incumbent upon the prosecution to prove the existence of a pre-arranged plan before common intention can be made out. (refer: *Words, Phrases & Maxims, Legally & Judicially Defined 3C(1)*, Anandan Krishnan - LexisNexis)

[40] Therefore, the court find that the prosecution has successfully proven its case beyond reasonable doubt. Both accused are convicted pursuant to s. 302 of the Penal Code, and be sentenced to hanging till death.